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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 242

HILLCREA EXPORT AND IMPORT CO., INC., BRISTOL-KING CO., INC., and BACHRACK BROS., INC.,

Petitioners,

against

UNIVERSAL INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNIVERSAL INSURANCE COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action on April 29, 1954.

Opinions Below

The opinion of the District Court for the Southern District of New York (255a-268a)* is reported at 110 F. Supp. 204. The *per curiam* opinion of the Court of Appeals for the Second Circuit (*infra,* page 14,) is reported at 212 F. 2nd 206.

* Numerals followed by letter "a" in parentheses refer to page number of printed appendix to appellants' brief in the Court of Appeals.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on April 29, 1954. The jurisdiction of this court is invoked under 28 U. S. C. §1254 (1).

Question Presented

The question presented relates to the meaning and effect of the so-called "warehouse to warehouse" clause which is now contained in practically every ocean marine cargo policy. The standard "warehouse to warehouse" clause reads as follows (pl. exh. 13A):

> "1. This insurance attaches from the time the goods leave the warehouse at the place named in the policy, certificate or declaration for the commencement of the transit and continues until the goods are delivered to the final warehouse at the destination named in the policy, certificate or declaration, or a substituted destination as provided in Clause 3 hereunder."

Does the "warehouse to warehouse" clause protect the assured in the following situation: a buyer contracts to purchase goods which are then located in various warehouses of the seller. Thereafter, the seller obtains a policy containing the "warehouse to warehouse" clause, and arranges for a ship to pick up the goods at a dock. The seller, however, pursuant to agreement, brings the goods to the dock at his own expense. Before the ship arrives, the goods located in a structure on the dock, are destroyed.

The preliminary question to be answered is whether the assured, as soon as he contracts to purchase the goods located in the outlying warehouses, acquires an insurable interest in the goods, even assuming he does not have title.

The foregoing is nothing more than the usual F. O. B. or F. A. S. situation where the seller agrees to make de-

livery aboard or alongside ship or train, from his own warehouses, at his own expense.

If the purchaser has an insurable interest in the goods while they are still in the seller's warehouse, and thereafter obtains a policy containing a "warehouse to warehouse" clause, would coverage attach as soon as the goods begin to move from those warehouses to the dock?

Giving respondent the benefit of every conceivable fact found below, does it make any difference in such situation, under the "warehouse to warehouse" clause (a) that the seller himself moved the goods from the warehouse to the structure on the dock; (b) that other goods in addition to the assured's goods also moved at the same time; (c) that the goods had not been "completely" segregated or banded for shipment when the goods left the original warehouse but were banded and segregated on the dock?

Statute Involved

There is no statute directly involved. However, bearing upon the question of whether title to goods is necessary to constitute an insurable interest, there is indirectly involved §148 of the Insurance Law of the State of New York, which reads as follows:

"§148. Insurable interest in property

> No contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. The term 'insurable interest,' as used in this section, shall be deemed to include any lawful and substantial economic interest in the safety or preservation or property from loss, destruction or pecuniary damage."

Statement

This action was brought by petitioners to recover the sum of $150,026 under an ocean marine cargo policy containing a "warehouse to warehouse" clause (R. II-VII, XII). Federal Court jurisdiction was invoked in the complaint on the ground of diversity of citizenship (R. II-III).

On September 5, 1946, petitioners entered into a contract with the Government for the purchase of a quantity of surplus clothing located in various parts of the Aleutians (255a-257a; 5a; pl. ex. 1, 2, 222a-225a). The contract provided that the goods were sold "as is—where is" (pl. ex. 2, 225a). The particular goods which are the subject of this action were then situated in various Government warehouses in Dutch Harbor, Alaska, about a mile and a half from the water's edge (260a; pl. ex. 5, 226a; chart annexed to pl. ex. 31).

The policy of insurance, containing the "warehouse to warehouse" clause (*supra*, p. 2) was issued on November 25, 1946 (pl. ex. 13A). In October, 1946 petitioners had attempted to get regular transportation of the goods from Dutch Harbor to Seattle but commercial transportation was not available (10a; pl. ex. 6, 7, 8, 9, 228a-232a). Petitioners applied to the army transportation service and on November 26, were informed that the army steamer "Pier Bend" would be available at commercial rates (16a).

This was confirmed by letter early in December (pl. ex. 11, 234a). Meanwhile, the Alaskan authorities were pressing for the removal of the goods, cabling in part on December 5, 1946 (pl. ex. 15, 238a).

> "OPPORTUNE TIME TO LOAD AND SHIP FROM DUTCH IS IMMEDIATE FUTURE AS NAVAL PERSONNEL NOW AVAILABLE THEREAT TO ASSIST FOR LIMITED TIME."

Respondent insurance company, by December 12, 1946, knew that the "SS. Pier Bend" was scheduled to move the

merchandise from Dutch Harbor when it approved petitioners' formal declaration of this shipment and vessel (pl. ex. 14, 236a) on that day.

The "Pier Bend" was due back to Seattle from Dutch Harbor (with the goods) during the first days of January, 1947 (pl. ex. 11, 234a).

None of these facts was disputed. Indeed the trial court referred to the "SS. Pier Bend" as "the ship intended by plaintiffs to carry the cargo" (Finding 16, 261a).

Government personnel and trucks started to move the goods to a structure on the dock during the first week of December, 1946 (43a) and the job was finished a day or two before the fire which destroyed the dock and the structure on December 21st and 22nd (50a-51a; 260a).

It was petitioners' contention in the District Court that petitioners having contracted to purchase the goods as early as September, 1946 on an "as is—where is" basis while the same were in the outlying warehouses at Dutch Harbor, acquired an insurable interest in those goods, at those warehouses, and at that time, even though they had not, as yet acquired title; that the subsequent movement of those goods during the time the policy was already in effect, came within the coverage of the "warehouse to warehouse" clause, even though the goods were again placed in a structure on the dock awaiting the arrival of the "SS. Pier Bend."

The District Court, however, found for the respondent on the basis of certain factual findings made by it, which the Court felt required a non-suit, notwithstanding the clear language of the "warehouse to warehouse" clause.

These findings, Nos. 11 and 13 respectively, (260a) were the basis of the affirmance by the Court of Appeals (*infra,* p. 14). Both Courts ignored petitioners' contention that these facts, even if conceded, should not permit respondent to escape liability under the plain language of

the policy. For example, finding No. 11, refers to the fact that the government with its own personnel and trucks, moved the goods from the outlying warehouses to the water's edge. This is no different than the usual situation where a purchaser buys goods on an F. A. S. or F. O. B. basis, in which case, the seller, at his own expense, is required to move goods from his warehouse to the ship or railroad car. The additional fact, referred to in this finding, that other goods were moved at the same time, by such seller likewise could hardly defeat an assured's right to recover; otherwise the rights of an assured, thousands of miles away, would turn upon whether the shipper moved only the buyer's goods or whether for convenience he moved other goods as well.

As to finding No. 13 (260a), that the goods had not been "*completely* segregated, banded for shipment or otherwise made ready for transport by sea," when they left the warehouses, petitioners pointed out that there was nothing in the policy to indicate that there had to be *complete* segregation, banding or making ready for sea to satisfy the "warehouse to warehouse" clause. (Actually, it will be noted that there is nothing in the record which indicates in what respects the goods had not been made ready for sea.) Again, accepting the second part of finding No. 13, that some of the surplus property was banded and segregated in the structure on the dock, we reiterate that there is nothing in the policy which says that the goods must be completely banded or segregated in the original warehouse rather than at any other convenient point.

Both courts below wholly ignored the argument that the point at which petitioners had acquired an insurable interest was while the goods were still in the outlying warehouses and that the subsequent movement of these goods to the dock, while a policy containing the "warehouse to warehouse" clause was in operation, was all that was necessary for recovery under the plain language of the instrument, even if we assume the existence of every fact raised by the respondent.

Reasons for Granting the Writ and Supporting Argument

Today, practically all cargo in international and coastwise commerce is protected by the ocean marine cargo policy. Practically 100% of these policies, both American and British, contain the so-called "warehouse to warehouse" clause (printed herein *supra* at page 2).

The question presented is therefore of universal importance, to all buyers, sellers, importers and shippers of goods who deal on a F.O.B. or F.A.S. basis.

Despite the foregoing, it is astonishing that there is almost a complete dearth of authority as to the meaning and effect of the "warehouse to warehouse" clause. In fact, Judge MURPHY, after pointing out that "the warehouse to warehouse" clause appears to be of relative recent origin, stated (263a):

> "The 'warehouse to warehouse' clause extended coverage to risks prior to loading, but how far is the question involved here. This has not been the subject of any considerable reported litigation. Indeed counsel have failed to call attention to a single case even remotely in point and the court has found but a few."

What "warehouse" must the goods leave in order to be covered? The few cases referred to by the trial judge, on their face, have nothing to do with the question as to when the risk attaches under a "warehouse to warehouse" clause.

The only case we have been able to find, where an insurance company questioned coverage at inception under a "warehouse to warehouse" clause is *Symington* v. *Union Insurance Co.*, 30 Lloyd's List Law Reports 280 (Kings Bench Div.) (1928). In that case the insured had a factory and warehouse at San Roque, Spain, which was about eight miles from the Port of Algerciras. The insured, *over a*

period of six months, had sent daily quantities of cork from his warehouse to a jetty at Algerciras, where he had accumulated over 2,000 bales of cork. The goods were destroyed on February 9, 1920, while on said jetty. The insured had arranged to ship this cork on the S. S. Hillhouse on February 20, 1920. The Kings Bench Division held, that under the "warehouse to warehouse" clause, the goods were covered when they left the insurer's warehouse since they "were in the ordinary course of transit". On appeal to the Queen's Bench (31 Lloyd's List Report 179) the decision was unanimously affirmed, the court saying at page 181:

> "The warehouse clause to my idea, has been inserted because the shipper, the owner of the goods wants to cover his goods for the whole transit, including a period before they are on the ship and including a period after they are on the ship, while in each case they are completing the transit though on land. Therefore, I see no difficulty in holding that the goods on the pier at Algerciras, having come in the ordinary course of a transit from the shipper's manufactory at San Roque, were covered by the policy."

We submit, that assuming every fact found below to be true, the decision reached, as it now stands, casts serious doubt as to the coverage of the "warehouse to warehouse" clause where the shipper has control of the original movement of the goods. It certainly affects the coverage of every F.O.B. or F.A.S. shipment. By their very terms, an F.O.B. or F.A.S. movement implies that the shipper, at his own expense, and possibly his own equipment, will move the goods from his warehouse to the shipping point. In such cases, the shipper may not always wholly segregate his shipment or completely band his goods, until they have reached a place on the dock which is convenient for him. The purchaser has no control of the means or method of

shipment from the warehouses. All he can do to prevent against loss, is to take out a policy containing a "warehouse to warehouse" clause.

There is nothing in the standard "warehouse to warehouse" clause requiring that the assured, rather than the seller, move the goods to the dock in order to be covered. There is nothing in the clause or policy which prohibits the seller from moving his own goods, segregated or unsegregated, together with those of the assured in order for the policy to have efficacy. There is nothing in the clause or policy requiring the goods to have any particular bands on them when the goods leave the original warehouse.

The point is that a purchaser under a F.A.S. or F.O.B. contract, acquires an insurable interest in the goods, *where they are situated,* and *as soon* as he contracts for their purchase. If a loss occurs on the trip to the dock or on the dock itself, before the ship arrives, he may not be able to replace his advantageous purchase at the same price and thus suffer an economic loss—even though not liable for the purchase price itself. By agreeing with the insurance company as to the actual value of the goods (as was done here, pl. ex. 14, 236a) he in effect insures his potential profit.

We believe that the key to the problem as to the particular point where the insurance policy begins to operate, lies in the question of insurable interest. It seems logical that where a purchaser contracts to buy goods then located in a warehouse and thereafter procures a policy containing a "warehouse to warehouse" clause, that it is intended that coverage attach as soon thereafter as possible, to wit, as soon as the goods begin to move from that warehouse.

Respondent insurance company strenuously urged in the courts below that petitioners could not recover because

they did not have title to the goods while they were in the outlying warehouses. However, there is not the slightest question but that such insurable interest did exist even without title.

Thus, in *Harrison* v. *Fortlage,* 161 U. S. 57 (40 L. ed. 616) a contract for the purchase of sugar provided "no arrival no sale." Though title had not passed, this court said, at page 65:

> "It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself. In the present case, the plaintiffs in error, under a valid contract in writing, had an insurable interest, by reason of the title which would *accrue* to them *upon arrival and delivery,* and of the injury which they *might* suffer by a previous loss of the goods." (Italics ours.)

In *Filley* v. *Pope,* 115 U. S. 213 (29 L. ed. 372) this court said at page 220:

> "Again; the buyer would have an insurable interest in the iron during the voyage, by reason of the title which would accrue to him under the contract on arrival and delivery, and of the profits that he might make a case of a rise in the market." (Citing cases.) (Italics ours.)

In *Hooper* v. *Robinson,* 98 U. S. 528 (25 L. ed. 219), which involved a marine policy, this court said at page 538:

> "A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the

> assured may be sufficient, and a *contingent* interest thus arising may be made the subject of a policy." (Citing cases.) (Italics ours.)

The New York cases are to the same effect. Thus, in *National Filter Co.* v. *Insurance Co.*, 106 N. Y. 535, the court, referring to the New York authorities, said at page 541:

> "They decided that an interest, legal or equitable, in the property burned, is not necessary to support an insurance upon it; that it is enough if the assured is so situated as to be liable to loss if it be destroyed by the peril insured against."

See also: *Riggs* v. *Insurance Co.*, 125 N. Y. 7; *Berry* v. *Insurance Co.*, 132 N. Y. 49; 56.

We have already adverted to the New York Insurance Law, Sec. 148 (*supra*, p. 3) which clearly indicates that title is not necessary for an insurable interest.

Aside from the cases, the policy itself negatives the necessity of title. The policy (pl. ex. 13) not only insures petitioners "as interest may appear" and "for the account of whom it may concern" but also provides that it covers

> "all shipments consigned to assured or to others for their account or control or in which they have an interest, to the extent of that interest."

The effect of an insurable interest as applied to a "warehouse to warehouse" situation may be illustrated as follows: Let us suppose petitioners (or other F. O. B. purchasers) were conceded to have acquired absolute title to the goods while they were in the original warehouses. Could it be reasonably argued in such case that a subsequent movement of their *very own* goods from the outlying warehouses would not be covered by the policy, even

though the vendor was moving the same to his own dock? Could any of the facts found in findings 11 and 13 have made difference if petitioners had actually acquired title? But on principle, it makes no difference whether the insurable interest is that of legal title, equitable title or of something less than title. No case suggests that the *degree* of insurable interest, determines whether or not a risk is covered. The purchaser's rights under the "warehouse to warehouse" clause are precisely the same, we submit, in an F. O. B. movement from a warehouse, as in a case where legal title had technically passed before the goods left the warehouse.

Shippers, consignees, importers and exporters throughout the world deal with these policies day in and day out. Shipments from interiors to shipping points are presumably covered under the "warehouse to warehouse" clause. The decision reached below is a precedent which affects those shipments by producing uncertainty while the question presented in this case is simple, the effect is far reaching.

When we consider the underlying principle upon which this case has been decided, every F.O.B. or F.A.S. purchaser must be constantly on his guard; for if the vendor uses his own trucks or ships goods from warehouse to dock at his own expense, the policy will not cover; if the vendor mixes his goods with the goods of other people, the policy will not cover; if the vendor happens to band his goods at a convenient point outside the original warehouse or at the dock, the policy will not cover. This is the sum and substance of the decision reached below as affirmed by the Court of Appeals (*infra*, p. 14). There is certainly nothing in the standard "warehouse to warehouse" clause, as it exists today, to suggest such lack of coverage under such facts. If it is the intention of the insurance companies not to cover when these facts exist, they should say so in plain words.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

Dated: July , 1954.

APPENDIX

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of April one thousand nine hundred and fifty-four.

Present:

HON. HARRIE B. CHASE,
Chief Judge,
HON. THOMAS W. SWAN,
HON. JEROME N. FRANK,
Circuit Judges.

HILLCREA EXPORT & IMPORT CO. INC. *et al.*,

Plaintiffs-Appellants,

vs.

UNIVERSAL INSURANCE CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

Per Curiam Opinion of United States Court of Appeals

HILLCREA EXPORT & IMPORT CO., Inc., Bristol-King Co., Inc., and Bachrack Bros., Inc., Plaintiffs-Appellants, v. UNIVERSAL INSURANCE COMPANY, Defendant-Appellee.
No. 216, Docket 22722.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

Argued April 7, 1954.

Decided April 29, 1954.

Appeal from a judgment of the District Court for the Southern District of New York dismissing the complaint on the merits after trial by court in a suit upon a policy of insurance; Thomas F. Murphy, District Judge.

Nathan, Mannheimer, Asche & Winer and Enrico S. Sanfilippo, New York City (Alfred B. Nathan, A. J. Asche, New York City, of counsel), for plaintiffs-appellants.

Bigham, Englar, Jones & Houston, New York City (Martin P. Detels, Vincent L. Leibell, Jr., New York City, of counsel), for defendant-appellee.

Before CHASE, Chief Judge, and SWAN and FRANK, Circuit Judges.

PER CURIAM.

It is clear that the judgment cannot be reversed unless findings of fact, especially those appearing in the appellants' appendix as Nos. 11 and 13, are set aside. These findings are supported by substantial evidence and the inferences drawn from the facts, being reasonable ones, are likewise supported. Consequently, no error has been shown.

Affirmed.

FILED
AUG 25 1954
HAROLD B. WILLEY, Clerk

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No. 242

HILLCREA EXPORT AND IMPORT CO., INC., BRISTOL-KING CO., INC., and BACHRACH BROS., INC.,
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—against—

UNIVERSAL INSURANCE COMPANY,
Respondent.

RESPONDENT'S REPLY TO THE PETITION FOR CERTIORARI

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Respondent.

RESPONDENT'S REPLY TO THE PETITION FOR CERTIORARI

Question Presented

The only question presented concerns the application of a particular clause in a marine insurance policy to a special set of facts involving a contract for the future sale in the remote Aleutian Islands of government surplus property which the Government never delivered and the petitioners never paid for.

Statement

The following facts, although in the record, do not appear in the Petition:

Petitioner, Hillcrea Export and Import Co., Inc., signed a special letter agreement, dated September

5, 1946, with the Surplus Property Office of the Department of the Interior, which provided that in furtherance of the foreign relief program the Government "will sell" to Hillcrea "surplus property consisting principally of clothing, of all types and conditions, located on the Aleutian Chain of Islands * * *." It was also agreed between the parties "that available property on the above islands will be delivered to such ships at such of the above islands as they may touch." (Pl. Ex. 1 at 222a, 223a, 4a).

By the terms of the same letter agreement, Hillcrea was required to deliver to the Government a certified or cashier's check for $100,000 as a deposit fund. "Payment to the vendor for the value * * * of the property delivered * * * shall be by book withdrawal from the above fund * * *" (Pl. Ex. 1 at 223a, 4a). The Government returned to Hillcrea so much of this deposit as would have applied to the surplus sued for (275a).

Incorporated by reference and physically attached to this letter agreement of September 5, 1946, was a paper labelled "Sales Conditions No. 1" (Pl. Ex. 2 at 224a, 4a). By its terms the Government reserved "the right to withdraw from sale any property prior to the removal thereof without incurring any liability except to refund to the purchaser, any amount paid with respect to such property."

The letter agreement of September 5, 1946 referred to no specific surplus property. It referred only to "available property".

On September 12, 1946, Hillcrea gave the Government its check for $100,000 (Pl. Ex. 3, 6a) as a deposit

(Def. Ex. J. at 325a, 306a). It was placed in a special account (135a) and never transferred to the Treasurer of the United States (Def. Ex. I at 323a, 143a).

On September 13, 1946, the Anchorage branch of the Surplus Property Office was advised via radio by the head office in Washington to establish the availability and suitability of the items of surplus property and it was also informed that Hillcrea retained the right to accept or reject them (327a).

Two Government representatives were sent to Dutch Harbor with instructions "to locate, inspect and appraise" surplus goods (62a). They did not arrive at Dutch Harbor until October 22, 1946 (31a) and no work was done on any of the items of surplus clothing during the rest of the month of October (70a, 71a, and 295a).

It is clear from the SPB1s' (Government lists of property declared surplus) (Pl. Ex. 33, 33a) that forty different types of surplus goods were spread around many warehouses located within the Navy installation at Dutch Harbor. Of the eight particular types of merchandise, comprising some 150,700 items, which are the subject of this litigation, none was found entirely within one warehouse. Such of the items as could be found, were found in many warehouses (Pl. Ex. 33, 33a and 292a).

It was agreed to put all surplus clothing in one dock warehouse (Pl. Ex. 34 and Def. Ex. B, 71a, entry for December 2, 1946 and 296a). This included at least thirty-two types of surplus goods in addition to the eight types in which petitioners claim on interest (Pl. Ex. 33, 33a). And even the SPB1s' (Pl. Ex.

33, 33a) were not intended to be a list of all clothing that the Navy considered surplus at Dutch Harbor (81a). Accordingly, such items of surplus property as could be found were moved over a minimum period of three weeks (95a) into Warehouse 159 (the building destroyed by fire) which was also located within Dutch Harbor. The procedure was to empty one warehouse first and bring all its contents into Warehouse 159 and then to do the same in connection with the other warehouses (Finding of Fact No. 12, 260a, 83a). One end of Warehouse 159 was cleared by the Navy "to store and segregate this property" (67a, 68a).

After the surplus goods, including 89,399 out of the 150,700 items (285a to 288a) in which petitioners claim on interest, arrived at Warehouse 159 they still had to be segregated (97a). There they were checked for count, condition and nomenclature (77a, 82a). All this was done in Warehouse 159 before the goods were banded (82a).

Warehouse 159 was one of the warehouses at Dutch Harbor (293a, 294a). It was 450 feet long and 80 feet wide (104a). It had a cement base and floor (57a). In fact the record is entirely barren of any proof that Warehouse 159 was constructed differently than any other warehouse at Dutch Harbor. It was simply one warehouse at Dutch Harbor into which the Navy decided to put all surplus clothing (Pl. Ex. 34 and Def. Ex. B, 71a, entry of December 2, 1946 and 296a).

The District Court properly decided the factual issues. The Court of Appeals unanimously held that the findings of fact by the District Court "are sup-

ported by substantial evidence and the inferences drawn from the facts, being reasonable ones, are likewise supported."

As is evident from the opinion of the Court of Appeals for the Second Circuit, the petitioners in that Court, unlike their present position, attacked the basic findings of fact of the District Court. There petitioners argued that the findings were clearly erroneous and they cited cases in their brief for the proposition that an appellate court can overrule a Trial Judge's findings when they are clearly erroneous.

Aside from the numerous important facts of this case that petitioners ignore, the ones set forth bear little resemblance to the actual situation.

The first assumption made by petitioners reads, "a buyer contracts to purchase goods which are then located in various warehouses of the seller" (Petition, p. 2). In the instant case, the letter agreement (Pl. Ex. 1 at 222a, 4a) referred to no particular goods. The Government simply agreed to sell in the future surplus goods provided they were suitable and available.

Petitioners' second assumption reads, "Thereafter, the seller obtains a policy containing the 'warehouse to warehouse' clause, and arranges for a ship to pick up the goods at a dock" (Petition, p. 2). In the instant case the Government was the potential seller and it did not obtain any policy. The potential buyer obtained a marine policy covering the goods during the proposed transit from Dutch Harbor to a United States Pacific port. The goods, however, never commenced this transit, but were merely collected into

Warehouse 159 from other warehouses so that they could be stored and segregated (67a, 68a) because they had been declared surplus (Pl. Ex. 34 and Def. Ex. B, 71a, entry of December 2, 1946 and 296a). At any time the Government, which owned them, was free to move them to still another or other warehouses also within Dutch Harbor.

Petitioners' third assumption reads, "The seller, however, pursuant to agreement, brings the goods to the dock at his own expense" (Petition, p. 2). In the instant case the Government put all surplus clothing into Warehouse 159 (Pl. Ex. 34 and Def. Ex. B, 71a, entry of December 2, 1946 and 296a) for storage and segregation (67a, 68a). Warehouse 159 was adjacent to a dock (57a) just as all warehouses are adjacent to some form of transportation. While there the goods were checked for count, condition and proper nomenclature (77a, 82a). This was done before they were banded (82a). The goods had never been moved out on the dock prior to the fire (Finding 17, 261a).

Petitioners' fourth assumption reads, "Before the ship arrives, the goods located in a structure on the dock, are destroyed." (Petition, p. 2). In the instant case there is no proof that the ship ever arrived. Furthermore, the goods were not located in a structure on the dock. The structure, which petitioners' attorney agreed was Warehouse 159, one of the warehouses at Dutch Harbor (293a, 294a), was located adjacent to the dock (57a).

Petitioners also contend that there is a preliminary question to be answered as to whether they had an insurable interest in the goods (Petition, p. 2). Actu-

ally, it was never necessary for the Trial Court or the Court of Appeals to answer this question which can only be considered subsequent to the main issue and not preliminary to it.

The main issue in this case is simple. Had the transit of the goods in question commenced from Dutch Harbor to a United States Pacific port at the time the fire destroyed the goods in Warehouse 159? The Trial Court held that it had not, stating that whether the goods "are within or outside the duration of risk 'is a question of fact from the circumstances of each particular case'. *Ocean Marine Insurance Co.* v. *Lindo, supra,* 30 F. 2d 782 at page 784." (264a). The Court of Appeals agreed with the Trial Court.

It is only when the insured transit is held to have commenced, that it becomes necessary to determine whether the claimant had an insurable interest covered by the policy. Since both Courts have agreed that the transit had not commenced under the facts of this particular case, it has never been necessary to determine whether these petitioners had either title or any other insurable interest covered by the policy. A finding in their favor on the latter point would be immaterial in view of the fact found by the Trial Court that transit had not commenced.

The Reasons for Denying the Writ

Petitioners would have it appear that the entire mercantile world has been thrown into a position of uncertainty because of the findings in this case. Actually, all the Trial Court and the Court of Appeals have decided here is that under a special set of facts, the

transit had not commenced so as to bring the alleged loss within "the duration of risk". There has been no ruling that under a different set of facts the result would be the same.

In the Trial Court the petitioners, as plaintiffs, argued for very different findings of fact than those actually found. In the Court of Appeals the petitioners, as appellants, argued that findings of the Trial Court were clearly erroneous. Now they contend that, nevertheless, they are entitled to prevail.

As the Court of Appeals stated in its opinion, it is clear that the judgment cannot be reversed without setting aside the findings of fact which that Court held to be supported by substantial evidence. The Court of Appeals further held that the inferences drawn by the District Court were reasonable and were likewise supported by the findings: which compel the conclusion that the judgment dismissing the complaint was proper.

The petition should be denied.

Respectfully submitted,

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